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WRITS OF ERROR FROM THE UNITED STATES SUPREME COURT TO VIRGINIA COURTS.

ARTICLE III, §§ 1, 2, of the federal Constitution, is as follows:

"Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior Courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

"Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

The concluding sentence of the Constitution required the ratification of nine states to make it effectual. New Hampshire had the honor of being the ninth state, having ratified it June 21, 1788. Virginia followed, on June 26, 1788, and New York on July 26, 1788.

The first Congress under the new form of government was to have met on March 4, 1789. A quorum did not attend until

April 6, 1789. On the next day the Senate appointed a committee to prepare and report a bill organizing the federal judiciary. Oliver Ellsworth, of Connecticut, was chairman, and was the draftsman of the bill in its original form. It passed the Senate on July 17, 1789, the House later, and was approved by Washington on September 24, 1789.

The twenty-fifth section of this act provided as follows:

> "That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court, rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record and immediately respects the beforementioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."

This is the famous twenty-fifth section of the Judiciary Act. Its substance is now embodied in § 237 of the Judicial Code.

The act rested upon the above-quoted provisions of the Constitution for its validity. Under its terms the Supreme Court took jurisdiction of several writs of error to state courts without question. But its constitutionality was not to be established so easily. The Virginia Court of Appeals attacked its validity in a historic case.

In December, 1781, Lord Fairfax died, but two months after the victory of his friend and former employee, George Washington, at Yorktown. At the time of his death Lord Fairfax was a citizen and inhabitant of Virginia, and owned extensive tracts of land in the northern part of the state. By his will he left large interests in these lands to his nephew, Denny Martin, then a resident and subject of Great Britain, on condition, among others, that he would take the Fairfax name.

As peace had not then been made, Denny Fairfax was an alien enemy. Various acts were passed by Virginia in relation to these lands but no formal proceedings by escheat were taken prior to the peace treaty of 1783, which forbade all future confiscations.

On April 30, 1789, a patent was granted by Virginia to David Hunter for a part of these lands as waste and unappropriated lands. In 1791 David Hunter brought an action of ejectment against the tenant of Denny Martin (or Fairfax) based upon this patent, in the state district court at Winchester. A case agreed was made up by the parties which recited the above facts, the various Virginia acts relating to the lands, the treaty of peace of 1783, and other matters not necessary to mention. The case was decided by the district court in favor of Denny Fairfax, whereupon the plaintiff appealed, the case having been revived in the meantime in the name of Philip Martin, Denny Fairfax having died.

The appeal was first argued in the Court of Appeals in May, 1796, but was long held under advisement, and was re-argued on October 25, 1809, before Judges Fleming and Roane, Tucker not sitting on account of relationship to one of the parties.

On April 23, 1810, the case was decided. Roane held that the various acts of Virginia in relation to the lands were a statutory escheat, that this was sufficient to vest title in the Commonwealth without any formal office found, that as Denny Fairfax was an

alien enemy, his title had been divested before the peace treaty, which forbade only future confiscations.

Fleming on the other hand held that the acts of Virginia in question were not intended to do away with the necessity of an office found; and that, as no such proceedings had been taken, the defendant's title, as far as that question was concerned, had not been divested prior to the peace treaty, and could not be thereafter.

Had this been the only question involved, it would have resulted in an affirmance by a divided court. But there was another question on which the two judges agreed. On December 10, 1796, Virginia had passed an act of compromise with those claiming through Fairfax by which they relinquished to the Commonwealth all waste lands within the Northern Neck, in return for a relinquishment by Virginia of other lands to them. The case agreed showed that the land in dispute was of this character, but this act had not been set out in the case agreed, which had been made in 1793. The judges, however, held that they could consider the act, and that it was binding upon Fairfax and those claiming under him. Consequently the case was reversed and remanded.

All the above appears from the report of the case in 1 Mun. 218. This volume of Munford's reports was published in 1812. The opinion is not made part of the order, which is in the following language:

> "And this court, proceeding to give such judgment as the said District Court ought to have given, is of opinion, that the law arising on the case agreed in this cause is for the appellant."

Thereupon judgment was entered in his favor, and Martin, the substituted defendant, applied for a writ of error to take the case to the Supreme Court, which was allowed by Judge Fleming, then President of the Virginia Court of Appeals.

The case was decided by the Supreme Court on March 15, 1813, and is reported under the name of Fairfax's devisee *v.* Hunter's lessee in 7 Cranch 603. The opinion was written by Story, J. He held that the Virginia acts, properly construed, required an office found, that there had been no such proceeding prior to the Jay treaty of 1794 with Great Britain, that the ninth article of

this treaty, allowing subjects of Great Britain who held lands in the United States at that time to continue to hold them, protected the title of Fairfax, and that the decision should be reversed. Johnson, J., dissented, holding an office found unnecessary. Both judges agreed, however, that the peace treaty of 1783 did not affect that question; and neither judge even mentioned the compromise act of 1796, on which the case really turned in the Virginia Appellate Court.

At the time of this decision the opinion of the Virginia court was accessible in printed form, but at that time the opinion of the court was not sent up as part of the record.

In August, 1813, the mandate of the Supreme Court was sent down to the Court of Appeals. It was in the usual form, and directed that the case be remanded to the Court of Appeals, with instructions to enter judgment for the defendant, Martin. After an argument extending over six days on the question whether the mandate should be obeyed, the judges, on December 16, 1815, delivered their opinions *seriatim*. For close reasoning the opinion of Cabell is a model; while for equally powerful logic and the more elegant graces of composition that of Roane can not be surpassed.

Cabell assumed for the purposes of his opinion that a constitutional question was involved, and went straight to a discussion of the question whether Congress could validly give the Supreme Court a right of review of state court decisions. He argued that the federal government in the powers delegated to it was no more supreme than the state governments in the powers reserved, that each was sovereign in its own sphere and could act only through its own instrumentalities, that no umpire had been provided; and that, like other sovereigns, each must decide disputed questions for itself; that each was presumed to regulate only its own agencies; and that an intent of one to act through the agency of the other must clearly appear and could not be left to inference. He then analyzed the constitutional provisions quoted at the beginning of this article, and contended that they were meant only to regulate the original and appellate jurisdiction of the federal courts, and not to apply to state courts; that the right of state courts to consider federal questions was expressly recognized by the

sixth article, which made the valid federal statutes and treaties the supreme law of the land, and required state courts to enforce them; that the Constitution gave no express right of review of state court decisions, and that the effect of such a right to direct the state courts what judgment to enter would be to convert them into federal courts, though the judges were neither appointed, paid, nor impeachable by the federal government. He admitted the right of Congress to authorize a removal to the federal courts, as that did not require any direction to the state courts in case of reversal; and he contended that this was defendant's real remedy, instead of taking his chances in the state court.

Roane followed the same line of reasoning with much amplification and wealth of illustration. He specially emphasized the fact that the order of reversal of the court of appeals was general, and merely to the effect that the law was with the appellant, that it might have turned upon many questions besides a federal question, and that in point of fact it did turn upon just such a question, namely the Compromise Act of 1796. Brooke and Fleming also filed opinions, and the court entered the following order:

> "The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States—that so much of the twenty-fifth section of the act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court; and that obedience to its mandate be declined by this court."

These proceedings in the Virginia Court of Appeals are reported in 4 Munf. 1-59.

The original defendant then sued out a second writ of error to this action—or non-action—of the Virginia court, and took the case again to the Supreme Court. On March 20, 1816,

Story, J., pronounced the judgment in favor of the validity of the act and the jurisdiction of the court.[a] He carefully reviewed the language of the constitutional grant to show that it must have been intended to confer a right of review over state courts. He held that it required Congress to vest the whole judicial power therein mentioned in some federal court, that the words "shall be vested" were mandatory, that inferior federal courts had to be established in which that part of the jurisdiction which was exclusive had to be vested; that where the Constitution used the expression "all cases" they were meant to be exclusive, but where the expression was "controversies," they were not exclusive; that the appellate jurisdiction of the Supreme Court depended on the nature of the case and not the court, and covered all the cases of the character named in whatever court they arose; that if the Constitution meant to limit the appellate jurisdiction to a review of inferior federal courts, the jurisdiction of such courts would have to be exclusive, otherwise the appellate jurisdiction would not extend to "all cases;" that if Congress did not establish inferior federal courts and the construction contended for, that there was no review of state court decisions, was sound, there would be nothing for the appellate jurisdiction to act on; that the Constitution was designed in many respects to act on state executives and legislatures, and that a supervision of the state judiciary in the particulars in question was no more an impairment of state independence; that the right of removal from a state to a federal court was nowhere expressly conferred, and yet was not questioned; that the second writ of error based on the refusal of the Virginia court to carry out the first decision clearly raised a federal question and did not go back to the first judgment, the propriety of which was not open on a second appeal; but that waiving this, the title set up by defendant depended necessarily upon the construction of a treaty, and was perfected by the Jay treaty of 1794.

He also urged as one of the strongest reasons for supposing that the Constitution gave such a right of review the necessity of uniformity in the decision of federal questions.

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[a] 1 Wheat. 304.

Johnson, J., who had dissented on the first decision, filed a separate opinion concurring in the result, but not in the reasoning of the opinion. He upheld the right of review, but contended that the final decision of the court should be enforced by direct process against the parties, and not by directions to the state court.

As to the Compromise Act of 1796, on which the case had really turned in the Virginia court, Tucker and Dexter had forcibly argued that the decision being general and the plaintiff not having specially set up his title by pleading or otherwise but having joined in a case agreed, there was nothing to show that the case had turned on a federal question. Story disposes of the Compromise Act in a paragraph by saying that he understood it to be a private act, and Johnson does not even mention it. So that in the last analysis the decision of the Virginia court was reversed, though in fact it had not turned on a federal question at all.

As to this last consideration, the settled doctrine of the Supreme Court now is, that if a case involves both federal and non-federal questions, and the non-federal question is sufficient to sustain the decision, it will not take jurisdiction.[1]

While the lamp of experience impels us to acquiesce in the result, the development of our legal history has refuted some of the contentions of Story in his opinions. Congress, for instance, has not conferred on any federal court or aggregation of courts all the jurisdiction authorized by the Constitution. It has limited their jurisdiction as to amount and subject-matter. It has not given them exclusive jurisdiction where the Constitution uses the expression "all cases." Questions arising under the Constitution and laws of the United States fall under this class, yet there are many of them in which the state courts alone can act. For example, in the Employers' Liability Act, cases brought in the state courts can not even be removed into the federal courts, and cases involving less than three thousand dollars can not be brought there. The very act which he was considering

[1] Eustis *v.* Bolles, 150 U. S. 361, 14 Sup. Ct. 131; Arkansas So. Ry. Co. *v.* German National Bank, 207 U. S. 270, 28 Sup. Ct. 79.

gave a right of review to the Supreme Court over the state courts only where the decision of the state court was against the claim of a federal right; and on this account to this day many cases involving a federal question may be decided by the state courts without the fear of federal review, provided only they construe and do not question its validity. The constitutional grant draws no such distinction.

This fact also weakens the force of his argument based on the necessity of uniformity of decision; for the state courts may construe a federal statute a dozen different ways so long as they do not question its validity or the validity of a right based upon it.

The question, however, was to receive another consideration in a form not so unpleasant, as it involved no conflict between courts. This time it was to come up from an inferior Virginia court. The statute gave the right of review of a final judgment or decree "in any suit in the highest court of law or equity of a state in which a decision in the suit could be had."

The act of Congress to incorporate the city of Washington allowed the city to "authorize the drawing of lotteries for effecting any public improvement in the city." Some enterprising citizens by the name of Cohen, desiring no doubt to help along such a patriotic object, sold some of the tickets of a lottery organized under the above provision to one William H. Jennings in the city of Norfolk, Virginia. They were proceeded against by information for a violation of the Virginia statute, in the Borough Court of Norfolk. A case was agreed which set up a right to sell tickets of such a lottery by virtue of the act of Congress. The court held that the act was not intended to override the state criminal laws, or to authorize the sale of tickets outside the District of Columbia if contrary to the local statutes. Consequently the accused were convicted, and then secured a writ of error from the Supreme Court. Barbour and Smyth on behalf of the Commonwealth of Virginia moved to dismiss the writ on the ground of lack of jurisdiction. The feature which distinguished the case from the Martin *v.* Hunter case was the fact that the state was a party, it being a criminal prosecution. However, the question of constitutionality involved

in that case was also pressed anew, and it was also contended that the act of Congress was merely local to the District and did not support the federal right asserted. Ogden and Pinkney opposed the motion to dismiss. On March 3, 1821, Chief Justice Marshall handed down an opinion denying the motion to dismiss. It is 55 pages long and is devoted mainly to showing that the appellate power of the Supreme Court extends to cases in which a state is a party. He denied that the constitutional grant limited the cases in which a state should be a party to the original exercise of jurisdiction, and drew the distinction, which has been treated as axiomatic ever since, between cases in which the jurisdiction depends on the parties regardless of subject-matter, and those in which the jurisdiction depends on the subject-matter regardless of parties. As to the point that the act of Congress properly construed did not support the federal right asserted, he answered very conclusively that the assertion of such a right gave jurisdiction, that the consideration of the validity of such a claim by the court was necessarily an exercise of jurisdiction, and therefore not a question of jurisdiction but a question to consider on the main hearing. It is impossible to pick any flaws in his reasoning, and his opinion was the last word that could be said on the subject.

The motion to dismiss having been denied, the case was argued on the merits, and the court decided that the act did not authorize the sale of the tickets outside the District in violation of the state law; so that after all the lower court was affirmed, and the Cohens were denied the right to corrupt the morals of Norfolk.[1a]

It is an important question of practice in Virginia whether the writ of the Supreme Court should go to the Court of Appeals or to the trial court in cases where the Court of Appeals refuses an appeal on the ground that the decision of the trial court is plainly right. For a long time there was no difficulty about the question, but two recent opinions of the Supreme Court have thrown the matter into confusion.

Let us start with the general principle. It is, that the writ must go to the court of highest appellate rank on whose records

[1a] Cohens *v.* Virginia, 6 Wheat. 264.

there is a final judgment, and which has a transcript of the record. One or two illustrative cases may make this plainer. In Atherton *v.* Fowler[2] it was said:

> "The writ is to operate upon the court having the record, and not upon the parties. The citation goes to the parties and brings them before us. The writ of error therefore is properly 'directed to the court which holds the proceedings as part of its own records and exercises judicial power over them.' If the highest court of the state retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. As it is the judgment of the highest court that we are to re-examine, we should, if we can, deal directly with that court, and through it, if necessary, upon the inferior tribunals. * * * But, in some of the states, as, for instance, New York and Massachusetts, the practice is for the highest court, after its judgment has been pronounced, to send the record and the judgment to the inferior court, where they thereafter remain. If in such case our writ should be sent to the highest court, that court might with truth return that it had no record of its proceedings and therefore could not comply with our demand. Upon the receipt of such a return, we should be compelled to send another writ to the court having the record in its possession. * * * So, too, if we are in any way judicially informed, that under the laws and practice of a state, the highest court is not the custodian of its own records, we may send to the highest court and seek through its instrumentality to obtain the record we require from the inferior court having it in keeping, or we may call directly upon the inferior court itself. But if the highest court is the legal custodian of its own records, and actually retains them, we can only send there."

An examination of the instances in which the writ has gone to an inferior court will disclose that the state appellate court, if asked to act in the matter, and acting, either by denying the writ or by hearing the appeal, returned the record to the inferior court.[3]

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[2] 91 U. S. 143.

[3] See as illustrations: Polleys *v.* Black River Imp. Co., 113 U. S. 81, 5 Sup. Ct. 369; Stanley *v.* Schwalby, 162 U. S. 255, 16 Sup. Ct. 754; Wedding *v.* Meyler, 192 U. S. 573, 24 Sup. Ct. 322.

Bearing this principle in view, it is in order to examin some of the cases which have gone to the Supreme Court from Virginia, especially those in which the Virginia Court of Appeals had refused to grant an appeal.

In Richmond F. & P. R. Co. *v.* Louisa Ry. Co.,[4] the writ of the Supreme Court had gone to the Court of Appeals. Mr. Justice Grier said:

> "The decree having dismissed the complainant's bill, was a final decree or judgment; and that decree having been affirmed by the Court of Appeals by their refusal to entertain an appeal * * * there can be no doubt of the jurisdiction of this court to review the decision of the state court."

In Underwood *v.* McVeigh,[5] the writ of the Supreme Court had issued to the Corporation Court of Alexandria, the court of first jurisdiction. The Court of Appeals, however, had actually heard the case and entered a judgment of affirmance, but had certified it down to the inferior court, though it retained the record. The Supreme Court sustained a motion to dismiss because its writ had not gone to the Court of Appeals.

Gregory *v.* McVeigh[6] is a leading case on the subject, and is valuable because the Virginia statutes then in force are explained. It too was a case originating in the Corporation Court of Alexandria. The party unsuccessful there applied to each one of the judges of the Court of Appeals for an allowance of an appeal, and each one successively refused it, stating in the order of rejection that they did so because the judgment of the lower court was plainly right. Under the Virginia statutes as they then stood, an application could not be made to the court after such action by the individual judges. Hence the unsuccessful party had exhausted her opportunity of appeal so far as the Virginia Appellate Court was concerned, and yet that court. as a court, had taken no action and there was no order on its records. Hence the Supreme Court decided that its writ must necessarily go to the trial court; for that was the only court that had any final judgment on its records.

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[4] 13 How. 71 (1851).

[5] 21 L. Ed. 952 (1874).

[6] 23 Wall. 294 (1875).

The counterpart of this is Williams *v.* Bruffy.[7] When the question arose in this case, the Virginia statute was substantially the same as in the previous case. But the application for an appeal was made, not to the individual judges of the Court of Appeals, but to the court as a court and refused by it as such. In reference to this, Justice Field, who wrote the opinion in the first decision of the case, said:

> "The court below gave judgment for the defendant; and the subsequent application of the plaintiffs to the Court of Appeals for a supersedeas was denied; that court being of opinion that the judgment was plainly right. Such a denial is deemed equivalent to an affirmance of the judgment, so far as to authorize a writ of error from this court to the Court of Appeals."

The Supreme Court then took jurisdiction and reversed the decision, saying in conclusion:

> "The action of the Court of Appeals of Virginia in refusing a supersedeas of the judgment of the Circuit Court must, therefore, be reversed, and the cause remanded for further proceedings in accordance with this opinion."

But the case was not to stop here. When the mandate went down to the Court of Appeals, that court declined to carry it out, mainly on the ground that it had no right to allow an appeal after the lapse of two years from the decision of the lower court. Its order is set out in full in the second report of the case. So the appellant came back to the Supreme Court with a Macedonian cry for help. In passing upon the nature of the order first entered by the Court of Appeals, Mr. Justice Field, who delivered the second opinion also, said:

> "It took jurisdiction of it so far as to examine the record of the judgment of the court below, and to pass upon its character. In its judgment, entered in its records, it states that the petition 'Having been maturely considered, and the transcript of the said judgment seen and inspected, the court being of opinion that said judgment is plainly right, doth deny the said supersedeas.' That judgment, thus entered, is a final determination of the character of the judgment of the inferior court. Although in the form of de-

[7] 96 U. S. 176 (1878); 102 U. S. 248 (1880).

> nying the supersedeas, it is not essentially different in its character and effect from a judgment dismissing such writ after it had been once granted and the merits of the case heard. * * * It is enough for our jurisdiction over the case, that there was a final judgment of the Court of Appeals, and our jurisdiction cannot be now ousted, after we have acted upon the case and passed upon its merits, by any suggestion that that court never took jurisdiction to look into the record of the inferior court and determine the character of its judgment; nor can we listen to any such suggestion in contradiction of the record of the case. * * * Whenever the highest court of a State, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question, will upon a proper proceeding attach. It cannot make any difference whether, after an examination, of the record of the court below, such decision be expressed by refusing a writ of error or supersedeas, or by dismissing a writ previously allowed."

In Chaffin *v.* Taylor,[8] the plaintiff in the case filed his petition in the Virginia Court of Appeals for the allowance of a writ of error. The court entered the following order:

> "The petition having been maturely considered, and the transcript of the record of the judgment aforesaid seen and inspected, the court, being of opinion that said judgment is plainly right, doth deny the said writ."

The writ of the Supreme Court was sent to the Virginia Court of Appeals. Justice Matthews said:

> "The judgment of the Supreme Court of Appeals is in substance a judgment affirming the judgment of the circuit court of Henrico County, and is therefore reviewable upon this writ of error by this court."

In Western Union Telegraph Co. *v.* Hughes,[9] the losing party in the lower court applied to the Court of Appeals of Virginia for an appeal, which, after being granted, was dismissed on motion, on the ground that the writ of error was improvidently awarded and that the court had no jurisdiction to entertain the

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[8] 114 U. S. 309, 5 Sup. Ct. 924 (1885).

[9] 203 U. S. 505, 27 Sup. Ct. 162 (1906).

same. The Supreme Court held that its writ should go to the court of original jurisdiction.

Then came Western Union Telegraph Co. *v.* Crovo.[10] The case had been tried in the Law and Equity Court of Richmond, Va. The telegraph company lost, and applied to the Court of Appeals for a review, which entered an order in the following words:

> "Virginia: In the Supreme Court of Appeals, Held at the Court House thereof, in the City of Staunton, on Thursday, the 10th day of September, 1908. The petition of the Western Union Telegraph Company for a writ of error and supersedeas to a judgment of the Law and Equity Court of the City of Richmond, entered on the 6th day of May, 1908, in the cause therein pending of Crovo & Crenshaw against the said Western Union Telegraph Company having been maturely considered, and the transcript of the record of the said judgment seen and inspected, the court, being of opinion that the said judgment is plainly right, doth refuse the writ of error and supersedeas prayed for."

Thereupon the telegraph company matured two writs of error, one to the Court of Appeals, and the other to the trial court. At the call of the case the court was asked which of the two to argue, and it directed counsel to argue the one to the lower court of first jurisdiction. The only argument of the case seems to have been upon the merits. At the decision the opinion uses the following languages:

> "A writ of error was denied by the Supreme Court of Appeals, under local practice, because the court thought 'the judgment was plainly right.' The plaintiff in error has sued out two writs of error: one to the Law and Equity Court of the city of Richmond, the trial court, and another to the Supreme Court of Appeals of Virginia. Inasmuch as the latter court denied a writ of error, the judgment of the Law and Equity Court was the highest court of the state to which the case could be carried, and a writ will therefore lie to that court if a federal question is properly saved."

This is all on the subject. Not one of the previous cases is even mentioned.

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[10] 220 U. S. 364, 31 Sup. Ct. 399 (1911).

If the student will now look back to the citation from the opinion of Judge Field in the Williams *v.* Bruffy case, which quotes the order of the Court of Appeals on which the Supreme Court acted in that case, and will look also at the order of the Court of Appeals which Justice Matthews held a sufficient order to be reviewable in the Chaffin *v.* Taylor case, he will see that they are *verbatim* the same as the order which the Supreme Court refused to consider in the Western Union *v.* Crovo case. This last pronouncement can not be reconciled with those decisions, but overrules them without argument, and without even honorable mention. And yet those decisions must be right. When a court says that it maturely considers a petition for appeal, sees and inspects the transcript of the record, and refuses an appeal because it considers the judgment plainly right, does it not necessarily consider the case on its merits? How else can it reach such a conclusion? Is not this necessarily, to quote Justice Matthews again in the Chaffin *v.* Taylor case, "in substance a judgment of affirmance"?

In Norfolk & Suburban Turnpike Co. *v.* Virginia,[11] in which the Virginia Court of Appeals refused a writ of error to the Circuit Court of Princess Anne County, the order of refusal is set out in full, and is *verbatim* the same as in the cases heretofore discussed. In fact this is the regular form followed by the Virginia Court of Appeals. There was a motion to dismiss on entirely different grounds. The court disposes of these, and then says:

> "But aside from the propositions on which the motion to dismiss rests, and which we have disposed of, there is an additional ground to which, on our own motion, we deem it necessary to refer; that is, the existence of a possible doubt as to our jurisdiction, begotten by the form in which the court expressed the action taken by it concerning the proceedings to review the order or judgment of the trial court. Thus, although the supreme court of appeals of Virginia denied a writ of error to the circuit court because it was of the opinion that the order of the lower court was 'plainly right,' it does not affirmatively appear whether, by this action, the court was merely de-

[11] 225 U. S. 264, 32 Sup. Ct. 828 (1912).

> clining to take jurisdiction of the case, or in effect was asserting jurisdiction and disposing of the case upon the merits by giving the sanction of an affirmance of the judgment of the trial court. This writ of error runs to the supreme court of appeals, and not to the trial court. In view of the ambiguity, it is unquestioned that the writ of error would have to be dismissed if we applied the ruling of the Western U. Teleg. Co. *v.* Crovo. It will be seen, however, that the court below, in acting upon the application presented to it to review the judgment of the trial court, conformed to what was held to be an exercise of jurisdiction by affirmance in Gregory *v.* McVeigh, 23 Wall. 294. * * * While, therefore, in this case, for the reasons stated, we entertain jurisdiction, and do not, of our own motion, dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur, and for the guidance of suitors in the future, we now state that from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state, declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow a writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo case."

Here, too, it is evident that there was no argument upon the question, and the older cases are not cited, with the exception of Gregory *v.* McVeigh. In that case the writ of the Supreme Court went to the trial court and not to the court of appeals for the reason that the refusal of the appeal was the act of the individual judges separately, and not the act of the court sitting as a court. And yet even that case expressly states that a refusal of the court itself to grant an appeal "is equivalent to a judgment of affirmance." When the Gregory *v.* McVeigh case was decided, an applicant for an appeal had the right under the Virginia practice to apply to the court in the first instance; but he could not apply to the individual judges and then to the court. Hence when he went to the individual judges first, he exhausted his chances. Under the present Virginia

statutes, as embodied in §§ 3465-7 of the Code of 1904, he can apply to the judges first and then to the court; so that he has not exhausted his efforts until he does the latter.

Where, then, was there any "ambiguity," any "complexity or doubt" until created by the unconsidered remarks in the Crovo case? If Justice Grier as far back as 1851 characterized refusal to entertain an appeal as an affirmance (in the case in 13 How. 71), if Chief Justice Waite considered it as "equivalent to a judgment of affirmance" (in the Gregory *v.* McVeigh case in 1875), if Justice Field speaks of it in the same terms (in the Williams *v.* Bruffy case) and considers it "not essentially different in its character and effect from a judgment dismissing such writ after it had been once granted and the merits of the case heard" (in the same case), if Justice Matthews considers it "in substance a judgment of affirmance" (in the Chaffin *v.* Taylor case) is there any reason for "a possible doubt" or "an affirmance in express terms"?

If an artist paints a horse so accurately that every one can recognize it, must he write "This is a horse" at the bottom of the canvas?

The question of the proper court to which to direct the writ is not a matter of court practice or court rule, to be changed from term to term. The statute itself requires that the writ must go to "The highest court of a state in which a decision in the suit could be had." Even the Supreme Court can not alter or amend this statute. Having decided in this long line of cases that such action of our appellate court is in effect a decision of the case, it is believed that the court on further consideration will not so summarily set them aside.

Robt. M. Hughes.

NORFOLK, VA